Supreme Court, U.S.
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No. 10-598

In The
Supreme Court of the United States

RICHARD KLEINHAMMER

Petitioner,

v.

CITY OF PASO ROBLES, California, et al.

Respondent(s),

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR REHEARING

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QUESTION(s) PRESENTED:

1. Whether a prisoner forced to chose between pursuing *reversal of conviction* and pursuing *civil litigation* for property damages to his home is constitutional. SUP CT. *R.* 10(c)...unsettled.

2. Whether the timing of the *Holland v. Florida* (June 14, 2010) decision created a conflict with this court decision January 18, 2011 denying petitioner's writ of certiorari because the Ninth Circuit June 22, 2010 holding cited cases that pre-dated *Holland v. Florida* and the District court initial February 2009 review pre-dated *Holland v. Florida* for remand to determine if facts in the record entitle petitioner to equitable tolling and whether further evidentiary proceedings are needed. SUP CT. R. 10(c)..conflict.

LIST OF PARTIES

The name of the Petitioner is:

Richard Kleinhammer.

The names of the Respondents are:

City of El Paso De Robles,
(referenced as "CITY")

James App,

Richard Ramirez,

Roger Picquet,

Jerry Bankston,

Templeton Community Services District,(Referenced as "TCSD")

Bill Miller.

Name of Interested Non-Party:

California Department of Corrections (referenced as "CDCR")

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APPENDIX A

A 2006 picture showing the 36 cubic feet of legal files for TRACT 1679 litigation files. Photo of Litigation files that was an exhibit attached to the Third Amended Complaint. (App. 1)

APPENDIX B

1993 letter from City of el Paso de Robles manager to Richard Kleinhammer (petitioner is this case) that this item is being litigated refusing to meet or provide documents. (App. 2-3)

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PETITION FOR REHEARING

Petitioner, Richard Kleinhammer's petition's this court for a rehearing following the January 18, 2011 denial of petition for writ of Certiorari requesting summary reversal.

CONSTITUIONAL AND STATUTORY PROVISIONS INVOVLED

First Amendment:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Govern-ment for a redress of grievances.

Eighth Amendment:
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment:
Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C § 1983:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Cal. Civ. Proc. Code 352 (1994):
Section 352(a)(3): "(a) If a person entitled to bring an action... be, at the time the cause of action accrued, either:" "(3) Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; the time of such disability is not a part of the time limited for the commencement of the action."

Cal Pen Code 2601(d):
2601. Subject only to the provisions of that section, each person described in Section 2600 shall have the following civil rights:

..... (d) To initiate civil actions, subject to a three dollar ($3) filing fee to be collected by the Department of Corrections, in addition to any other filing fee authorized by law, and subject to Title 3a (commencing with Section 391) of the Code of Civil Procedure.

Cal Code Regs. Title 15 Section 3161:
Inmate-owned legal materials/documents, law books and papers shall be limited to the availability of space authorized by section 3190(b) for personal property in the inmate's quarters/living area except as specified in this section. Inmates may possess up to **one cubic foot** of legal materials/ documents related to their active cases, in excess of the six cubic feet of allowable property in their assig-ned quarters/living area. Legal materials/ documents, lawbooks and papers in excess of this limitation shall be disposed of pursuant to section 3191(c). Inmates may request the institution/facility store excess legal materials/documents related to their active cases(s) when such materials/documents exceed this one cubic foot additional allowance. Inmate-owned law books in

excess of the additional allowance shall not be stored by the institution/ facility.

STATEMENT OF THE CASE

This case involves approximately $ 880,000.00 damages to real estate and government denial of access to legal files following notice of claims in which all other TRACT 1679 owners were paid damages except petitioner who was incarcerated.

During incarceration petitioner was forced to chose between pursuing post conviction remedies or pursuing a civil suit. Plus, prison staff refused to permit the civil litigation files to be mailed in on several occasions. In addition title 15 § 3161 only allowed 1 cubic foot. However this space was already taken with post conviction remedies files. And the amount of files in the civil case was "31 boxes" and voluminous files as described and conceded by respondents which respondents kept until petitioner was released. Even if arguendo petitioner was granted one cubic foot of civil files that would only amount to about 3% of the civil litigation. However Plaintiff's legal files were 36 cubic feet shown in the picture EXHIBIT A containing 22 boxes. (App. 1)

In addition plaintiff believed he could sue following release pursuant to California code of civil procedures 352 provided by the library.

Petitioner once released from incarceration requested settlement in February of 2006 which was denied and filed a lawsuit in August of 2006. Plaintiff lawsuit had reached the discovery phase in 2008 when interested party CDCR employees suddenly made petitioner unavailable for 4 months until after discovery closed and also denied him access to his legal files during that time. CDCR's denying access to legal was already alleged in the 2006 complaint against CDCR when the 2008 denial of access to legal files occurred. CDCR (e.g. government) timing at the discovery phase gives the appearance of an interested party intermeddler that rendered pro se ineffective. The 3 VHS tapes labeled CITY COUNCIL and TCSD seized by interested party CDCR further establishes the intent.

The rigid standard applied by the District court was that plaintiff must check the library each year for a change of law despite believing he could sue following release from incarceration pursuant California code of civil procedures 352 which does not address the denial of access to legal files in detail. The District court 2009 opinion only mentions that the complaint asserted equitable estoppel but was

not raised in the opposition to summary judgment.

CDCR employee also conducted ongoing interference during the summary judgment phase taking up 14 hours a week of petitioners time, withholding computers that contained years of petitioner legal research and opposition motions for the case, and were inflicting minor and serious physical injuries that petitioners doctor objected to. Plaintiff was sidetrack and distracted by CDCR employee that even required filing for injunction to attempt to stop CDCR from interfering with doctors treatment as a parolee and to stop continued infliction of injuries on petitioner.

Essentially the rule the lower federal courts have made is go to prison lose your home is perfectly constitutional. The details of notice of claims, respondent keeping the 31 boxes of legal files, respondents awareness of the 1 cubic foot title 15 limitation, and petitioner being denied access to legal files by prison staff and again later by actions of parole staff which respondents were also aware were all swept in to the rigid rule of checking the library every year without the benefit of the *Holland* decision.[1]

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[1] It should further be noted that in *Plata* and *Coleman* pending before this court regarding prison overcrowding inadequate medical care is an issue that carries over to parole because parole agents can and do interfere with even private doctor

Petitioner does not intend this to reargue the denial of the petitioner for writ of certiorari. Attention to the unsettled *Hebbe* and *Allen* issues of choice and the *Holland* issue of detailed review of reasonable not maximum feasible diligence rules.

REASONS FOR GRANTING REHEARING

I. Whether a prisoner forced to chose between pursuing habeas reversal of conviction and civil rights action for damages to real estate during incarceration is constitutional.

Forcing a prisoner to choose between *fourteenth amendment* and *eighth* amendment rights was found impermissible. A prisoner that must choose between using the prison law library and exercising outdoors is impermissible because "an inmate cannot be forced to sacrifice one constitutionally protected right solely because another is respected." *Allen v. City and County of Honolulu*, 39 F.3d 936, 940 (9th Cir.1994).

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medical care, simply a cruel and unusual agency regime. Prison overcrowding also appears to be the reason California changed the law to file suits within 2 years because of litigation cost related to condition of confinement although the policy basis targets frivolous lawsuit unlike petitioner's case in which all other owners except petitioner were paid damages.

cf. *Hebbe v. Pliler* _ F.3d ___ (9th Cir 2010) as modified November 2010 No. 07-17652 2010 U.S. App. Lexis 24018 (prisoner denied both eighth and fourteenth amendment by lockdown).

Petitioner's constitutional rights to both habeas corpus post conviction remedies and 42 U.S.C section 1983 condition of confinement suits were clearly established[2]. Similarly petitioner's rights under California law includes all civil suits[3] Cal Pen Code

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[2] Thus, the "tools" that *Lewis* and *Bounds* require to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. *Lewis v. Casey*, 518 U.S. 343, 354-55, 116 S.Ct. 2174, (1996).

[3] *Payne, Yarborough, Wantuch, Appollo, and Hoverstein:*

Under state law *Cal. Pen code* 2601(d) a prisoner has a statutory right to initiate civil action. Meaningful access to the courts is the "keystone" of an indigent prisoner's right to defend against and prosecute bona fide civil actions. (*Cal. pen. Code*, section 2601[former] subd. (e). Yarborough v. Superior Court [(1985) 39 Cal.3d 197, 200-201, accord Wantuch v. Davis (1995) 32 Cal.App.4th 786, 792. Generally, a trial court has discretion to choose among these and other remedies in safeguarding a prisoner litigant's right of meaningful access to the courts to prosecute or defend against a civil action threatening his or her interests (*Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1483-1484; citing *Yarbough* and *Wantuch*.).

In California the problem of inmate access to courts in civil matters remains is "a custom far more honored in its breach than in its observance (*Hoverstein v. Superior Court* 74 Cal.App.4th 636, 642-643, 68 Cal.Rptr..2d 197. 202 (Cal.App. 2nd Dist 1999):

2601(d) without the limitations suggested in Casey v. Lewis 518 U.S. at 354-355, Furthermore In *Wantuch* (1995) the court suggested several options including waiting until released from incarceration. *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792-793.

Petitioner's was subjected to condition of confinement that prohibited him from possessing both the legal files for habeas corpus post conviction remedies and legal files for a civil rights suit. Petitioner like in the *Allen* case was impermissibly forced to choose between constitutional rights. Petition also like in the *Hebbe* was outright denied his constitutional rights to have access to his legal files to even prepare.

Whether petitioner during incarceration can be forced to choose between constitutional rights of post conviction remedies or a civil suit has not been settled by this court. SUP. CT. R 10(c). Furthermore the lower federal courts failure to conduct an

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The Fourteenth Amendment to the United States Constitution prohibits a state from depriving any person of property without due process of law...while the constitutional right of access to the courts has for the most part been related to review of criminal convictions, particularly by writs of habeas corpus, the due process right is much broader; it includes access to all courts, both state and federal, without regard to the type of petition or relief sought. *Payne v. Superior Court of Los Angeles County* (1976) 17 Cal.3d 908, 914, 132 Cal.Rptr. 405, 553 P.2d 565.

analysis and refused to allow discovery on the fact intensive equitable tolling far departed from the accepted and usual course of judicial proceedings (SUP. CT. R. 10(a)) permitting summary reversal (SUP. CT. R. 16.1).

The prison limitation on legal files forced a choice between constitutional rights. As in *Allen* Petitioner being forced to choose between constitutional rights would violate the first amendment right access to court and fourteenth amendment equal protection and Due process clauses. Second Petitioner being outright denied access to his legal files like *Hebbe* violated the fourteenth amendment equal protection and due process clause.

Petitioner request this court to settle whether a prisoner being forced to chose between his constitutional rights (as contoured by California law) is constitutional. And settle if the forced choice and outright denial of a constitutional rights are impediments for constitutional tolling, even if other equitable tolling is denied by the District Court.

II. Whether The January 14, 2011 Denial Of Petitioner For Writ Of Certiorari In This Case Conflicts With This Court June 14, 2010 Decision In *Holland v. Florida* For Remand Because The Lower Court Applied A Rigid per se Rule Without Review Of Details According To Precedent.

Holland was decided June 14 of 2010 after the District Court ruling in February 2009. See *Holland v. Florida,* 560 U.S. , 130 S.Ct. 2549 (June 14, 2010).

The decision in *Holland* holds reasonable diligence does not mean maximum feasible diligence of a prisoner seeking equitable tolling, and recognized prudence that when faced with an equitable, often fact-intensive inquiry, of allowing the lower courts to undertake it in the first instance.[4] *Holland v. Florida* 560 U.S. , 130 S.Ct. 2549 (June 14, 2010).

The Ninth Circuit and District court failed to considered in detail the facts of the petitioner case. Like in *Holland* an application of a rigid standard that required "plaintiff to check the library each year for a change of law" which did not address the denial of access to legal files in detail for which there is Ninth Circuit precedent for guidance[5]. *Lott v. Mueller* 403 F.3d 918, 924 (9th Cir. 2002).

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[4] Further the cases used by the Ninth Circuit Court of Appeals pre-dated the 2005 holding in *Pace v. Diguglielmo* 544 U.S. 408 (2005).

[5] A prisoner denied access to his legal files by prison staff was granted equitable tolling *Lott v. Mueller* 403 F.3d 918, 924 (9th Cir. 2002)

Petitioner request this case be remanded to determine whether the record entitles petitioner to equitable tolling and whether further evidentiary proceedings might indicate petitioner should prevail pursuant to *Holland v. Florida* standard of diligence. The timing of the lower court decision were without the benefit of *Holland v, Florida*. In addition the lower court clearly applied a per se standard that was to rigid without considering precedent as in fn 4 above and denial of access to legal file details as fn 5 below. Also see SUP Ct. R. 10 (c) conflict and SUP 10(a) departed from usual course.

Two similar *Holland* type claims can be made one being petitioner's "fear of retaliation if litigating while incarcerated" and second related to Equitable Estoppel. In 2009 the District court acknowledged that the com-plaint asserted equitable estoppel. The evidence shows the CITY manager took the position of litigation with petitioner (Appendix B) yet the CITY without notifying petitioner changed their position for summary judgment arguments. The Ninth circuit has precedent to provides guidance for the in detail review pursuant to *Holland*. For example when respondent are aware they might be

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a precedent consideration for *Holland* 's in detail review of the reasonable standard of diligence.

subject to future suit by petitioner[6] but here were also aware of petitioners file access impediments.

Other than mentioning that petitioner complaint alleged equitable tolling the District court did not review in detail any facts. Nor was the fear of retaliation if litigating while incarcerated reviewed in detail. Instead the 2006 allegation was proven in 2008 when CDCR employee actually sent another prisoner to threaten petitioner following CDCR threats.

There was a confluence extraordinary circumstances to await release before filing suit as above described which included parole staff repeating the denial of access to legal files and numerous threats of arrest[7]. Certainly if ones parents can forebear filing suit the petitioner directly threatened may also. The lower court simply did not make a detailed review of anything other than their rigid rule requiring going to the library each year to see if Cal Civ Proc Code 352 changed for equitable

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[6] In *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002) shareholders were not given notice they might be subject to suit by him (Azer) personally separate from the corporation

[7] *Atecq v. Najor* 15 Cal.App.4th 1351, 1356(Cal.App.4th Dist. 1993)(3 years duress forbearance...tolled the statute of limitation where threats were made to have the plaintiff's son arrested e.g estoppels).

tolling and is to rigid to withstand the *Holland* standard.

CONCLUSION

For the foregoing reasons, petitioner Richard Kleinhammer respectfully request that this Court grant his Petition for rehearing and remand for further consideration in light of *Holland v. Florida*, 560 U.S. , 130 S.Ct. 2459, 177 L.Ed.2d 130, 2010 U.S. LEXIS 4946 (2010) and *Hebbe* or *Allen* barring being forced to choose between constitutional rights.

Respectfully submitted,

Richard Kleinhammer
pro se

DOCUMENT A

BEST AVAILABLE COPY

DOCUMENT B

City of el Paso de Robles
"The pass of the Oaks"

February 13, 1993

Richard Kleinhammer
1135 Golden Meadow Drive
Paso Robles, CA 93446

Re: Fax dated 2/23/93

Dear Mr. Kleinhammer:

Enclosed is the letter that was sent to your father, John Kleinhammer dated February 12, 1993 indicating that Templeton Community Service District should be contacted as to how you may obtain service to your property.

In response to meeting with me to review any proposed conditions or agreements of approval for point of service, this item is being litigated and further meetings will not be scheduled without both attorneys present.

Many of your request deal with opinions and are not request for documents. therefore, we appreciate your attorneys contacting Roger Picquet, City Attorney, at P.O. Box 922, San Luis Obispo, CA 93406 if you request additional information.

sincerely

s/ Richard Ramirez
Richard Ramirez
City Manager

RJR:ca

cc: City Council
Roger Picquet, City Attorney

encl.

City Manager * Post Office Box 307 * Paso Robles, California 93447-0307

CERTIFICATE OF COMPLIANCE

As a pro se petitioner of record, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2

s/ Richard Kleinhammer

Pro se Petitioner,
Richard Kleinhammer